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Supreme Court, U.S.
FILED

OCT 22 2010

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No. 10-558

In The

Supreme Court of the United States

Belinda Saunders,

Petitioner,

v.

Emory Healthcare, Inc.

Respondent.

APPENDIX "A"

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 09-10283 & 09-11530
Non-Argument Calendar

D. C. Docket No. 07-00282-CV-WSD-1

BELINDA SAUNDERS,

Plaintiff-Appellant,

versus

EMORY HEALTHCARE, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(January 11, 2010)

Before TJOFLAT, WILSON and ANDERSON, Circuit Judges.
PER CURIAM:

Belinda Saunders, proceeding pro se, appeals from the district court's order granting summary judgment to Emory Healthcare Inc. ("Emory") in her employment

discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. On appeal, Saunders argues that the district court erred by (1) denying her motion to strike a declaration attached to Emory's summary judgment motion, (2) granting in part Emory's motion to strike unauthenticated documents attached to her summary judgment response, and (3) granting Emory summary judgment on her racial discrimination, retaliation, and hostile work environment claims. After a review of the record and the parties' briefs, we affirm.

We review district court's rulings regarding the admission of evidence deferentially, testing for an abuse of discretion. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1276 (11th Cir. 2008). "We will not overturn an evidentiary ruling unless the moving party establishes a substantial prejudicial effect." Id.

Appendix A

We review the grant of summary judgment de novo. Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1274 (11th Cir. 2008). "Summary judgment is rendered 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)). "In making this assessment, the Court must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and must resolve all reasonable doubts about the facts in favor of the non-movant." Id. (quotation marks and citations omitted).

I. Evidentiary Rulings

The district court's denial of Saunders' motion to strike the Margolis Declaration was not an abuse of discretion. Margolis testified from personal knowledge as

required by Fed. R. Civ. P. 56(e). Saunders contends that the Declaration is inadmissible hearsay that cannot be properly considered on a motion for summary judgment, but concedes that under Fed. R. Civ. P. 56(e) and Macuba v. Deboer, 193 F.3d 1316 (11th Cir. 1999), affidavits and statements that would constitute hearsay, if reducible to admissible evidence, may be properly considered in support of a motion for summary judgment. In Macuba, this Court stated that "a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." Id. at 1323 (internal quotation marks omitted). As the district court correctly concluded, any documents attached to the Declaration are either non-hearsay or could be reduced to admissible form.

Saunders' further arguments are unavailing. Saunders argues that the district court erred by requiring

her to file an affidavit to dispute the Margolis Declaration. Saunders misapprehends the district court's statement that Saunders was permitted to submit affidavits disputing the Margolis Declaration. To the extent that Saunders argues that the Margolis Declaration should have been stricken based on inconsistencies with the record, Saunders has not supported that argument. Therefore, the district court did abuse its discretion by refusing to strike the Margolis Declaration. Saunders argues that Exhibits 9-35 of her own deposition should be stricken. Because Saunders' motion to strike focused only on the Margolis Declaration and not Exhibits 9-35, this Court will not consider that argument for the first time on appeal. See Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009) ("It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal.").

Appendix A

The district court's decision to grant in part Emory's motion to strike Saunders' unauthenticated exhibits was not an abuse of discretion. To be admissible in support of or in opposition to a motion for summary judgment, a document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2722, at 382-84 (3d ed. 1998). Because the exhibits were not properly authenticated, the district court was not required to consider them in opposition to Emory's motion for summary judgment. Moreover, many of the stricken exhibits were authenticated by either Emory or deponents in the case; therefore, striking Saunders' exhibits did not cause a substantial prejudicial effect. Because Saunders' exhibits were not properly authenticated and the decision to strike them did not cause

a substantial prejudicial effect, the district court did not abuse its discretion by striking the exhibits.

II. Discriminatory Hiring

"Racial discrimination claims based on circumstantial evidence are evaluated under the McDonnell Douglas burden shifting framework." Burke- Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006). A plaintiff establishes a prima facie case of disparate treatment by showing that: "(1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job." Id. Once the plaintiff establishes a prima facie case, "then the defendant must show a legitimate, non-discriminatory reason for its employment action." Id. Once the defendant meets that burden, "then the plaintiff must

prove that the reason provided by the defendant is a pretext for unlawful discrimination." Id.

A. CNS Position

Saunders concedes in her brief that the Clinical Nurse Specialist (CNS) position is not in dispute in this case. Therefore, she has waived any argument that Emory engaged in discrimination with regard to that position.

B. EC Position

The weight of the record indicates that the Educational Coordinator (EC) position was never created. Saunders, however, appears to contend that the CNS position, posted in December 2002 and filled in March 2003, was actually the EC position. In support, she cites Emory's admission in its Answer that "Paula Funderburke held the position of Education Coordinator." Regardless of the title of the position, it is undisputed that Saunders did not formally apply for the position posted in December 2002.

Moreover, even assuming that a general issue of material fact remains as to whether the EC position was created, Saunders' claims in regard to the position are time barred.

In its motion for summary judgment, Emory argued that, assuming the position posted in December 2002 and filled in March 2003 was the EC and not the CNS position, Saunders' claims under Title VII and § 1981 are barred. Saunders does not dispute that any claim relating to that position arising under Title VII is time barred and thus has abandoned that claim. Furthermore, any claim relating to that position arising under § 1981 is time barred.

Claims cognizable under § 1981 prior to the Civil Rights Act of 1991 are subject to the state statute of limitations for personal injury torts. See Moore v. Liberty Nat. Life Ins. Co., 267 F.3d 1209, 1219 (11th Cir. 2001). Because Saunders' failure-to-promote claim was cognizable under § 1981 prior to the Civil Rights Act of 1991, Georgia's two-year statute of limitations for personal

injury torts applies. See O.C.G.A. § 9-3-33 (2007). The position was posted in December 2002 and filled in March 2003. Saunders filed her complaint on December 26, 2006. Because Saunders did not file her complaint within the two-year statute of limitations, any claim under § 1981 is time barred.

C. NDD Position

Saunders does not challenge the district court's finding that she failed to establish a prima facie case of discrimination related to this position because she did not apply for the position. See Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1275 (11th Cir. 2002) (requiring plaintiff show that "she applied for and was qualified for an available position" to establish adverse employment action in failure-to-hire context) . Therefore, Saunders has waived any argument relating to this position on appeal.

Appendix A

D. ANM Position

Emory concedes that Saunders established a prima facie case with respect to the Acting Nurse Manager (ANM) position. Emory has proferred a legitimate nondiscriminatory reason for its decision, namely that the interview panelists for the position unanimously rated Sampsel higher based on her better communication and leadership skills and because she lacked the disciplinary record that Saunders had amassed. Saunders claims the disparity in qualifications between herself and Sampsel and Emory's failure to follow its hiring policies demonstrate that Emory's proferred reason is pretextual.

"[A] reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Springer v. Convergys Customer Mgmt. Group Inc., 509 F.3d 1344, 1349 (11th Cir. 2007) (internal quotation marks omitted). In the context of promotions, we have held that

"a plaintiff must show that the disparities between the successful applicant's and his own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" Id. (quoting Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)). "Standing alone, deviation from a company policy does not demonstrate discriminatory animus." Mitchell v. USBI Co., 186 F.3d 1352, 1355-56 (11th Cir. 1999).

Saunders has failed to demonstrate that Emory's proferred reason is pretextual. Emory's decision to waive the minimum years of clinical experience requirement in Sampsel's favor and to prefer Sampsel over Saunders in spite of the fact that Saunders had more clinical experience was reasonable in light of the evidence showing that Sampsel was better qualified in terms of communication,

leadership, and workplace behavior, skills of great importance in a management position. Therefore, Saunders has failed to demonstrate that Emory's proferred reason is false. Moreover, Saunders has failed to produce any evidence indicating that discrimination was the actual reason behind the decision to hire Sampsel.

III. Retaliation

"To establish a claim of retaliation under Title VII or section 1981, a plaintiff must prove that [s]he engaged in statutorily protected activity, [s]he suffered a materially adverse action, and there was some causal relation between the two events." Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008). "After the plaintiff has established the elements of a claim, the employer has an opportunity to articulate a legitimate, nonretaliatory reason for the challenged employment action as an affirmative defense to liability." Id. "The plaintiff bears the ultimate burden of proving retaliation by a preponderance

of the evidence and that the reason provided by the employer is a pretext for prohibited retaliatory conduct." Id.

The scope of "adverse employment actions" is broader in the anti-retaliation context than in the anti-discrimination context. In the anti-retaliation context, adverse employment actions are those that might dissuade a reasonable worker from making or supporting a charge of discrimination. Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006). This Court recognized in Crawford v. Carroll, 529 F.3d 961, 973-74 (11th Cir. 2008), that Burlington Northern broadened the type of conduct actionable in a retaliation claim and effectively rejected our previous requirement of showing an ultimate employment decision or substantial employment action to establish an adverse action for a retaliation claim. In order to establish the necessary causal link, "a

plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Goldsmith, 513 F.3d at 1278 (quotation marks omitted).

The district court divided possible retaliatory actions taken after the filing of Saunders' EEOC charge into two groups: formal discipline and changes in job duties and perks. Because this is a convenient way to analyze Saunders' complaints, we will proceed in the same fashion.

A. Formal Warnings

Saunders contends that she was subjected to disciplinary warning meetings in December 2005 and January 2006 in retaliation for filing her initial EEOC charge. Assuming, as the district court found, that formal disciplinary warning meetings might well dissuade a reasonable employee from making or supporting a

charge of discrimination, the burden passed to Emory to articulate a legitimate non-retaliatory reason for the warnings. The record supports Emory's claim that the meetings were motivated by numerous complaints about Saunders' workplace performance or attitude. Saunders has produced no evidence indicating the proffered reason is pretextual. The four month time lag between the filing of her complaint with the EEOC and the disciplinary warning meetings, especially standing alone, is far too attenuated to support the inference that Emory's articulated reason is actually pretext for prohibited retaliation.

B. Changes in Job Duties and Perks

Saunders also contends that she suffered a decrease in the frequency with which she performed charge nurse, in-service, and precepting duties and changes to her holiday and vacation schedule in retaliation for filing her initial EEOC charge. It is undisputed that the schedule

changes were applied not just to Saunders but to all part-time nurses in the emergency department; therefore, Emory has proferred a non-retaliatory reason for the changes in Saunders' schedule. Saunders has no produced no evidence indicating that Emory's proferred reason is pretext for illegal retaliation. It is also undisputed that the decrease in certain duties has not resulted in tangible effects such as a decrease in pay or failure to maintain her current certification. In the wake of Burlington Northern, however, the employer's conduct need not reach the level of an ultimate or substantial employment action to constitute actionable adverse conduct. The conduct only need be serious enough that it might dissuade a reasonable worker from making or supporting a charge of discrimination.

The Supreme Court's discussion in Burlington Northern provides some insight into when an employer's conduct might dissuade a reasonable worker from

making or supporting a charge of discrimination. In Burlington Northern, the Supreme Court concluded that even a total "reassignment of job duties is not automatically actionable." 548 U.S. at 71; 126 S. Ct. at 2417. Discussing reassignments, the Court indicated that the nature of work being performed or the necessity of greater qualifications for certain duties was relevant to whether a reassignment was actionable. Id. In this case, Saunders has not suffered a total reassignment, but simply a decrease in certain responsibilities. There is no evidence that she has been assigned more difficult or arduous work in lieu of these responsibilities. Furthermore, the record indicates that these responsibilities are part of the normal duties of a Level IV registered nurse; there is no evidence that these responsibilities require greater qualifications or carry greater prestige than

any of the other duties of a Level IV registered nurse. Because this slight decrease in the frequency with which Saunders performs certain job responsibilities does not rise to the level of actionable retaliation, Saunders cannot establish a prima facie case based on those actions.[1]

IV. Hostile Work Environment

Title VII protects workers from a "workplace . . . permeated with'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) (citation omitted). "This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment

[1] We also note that there is no evidence supporting Saunders' further allegations that she was subjected to constructive discharge, was denied the opportunity to apply for a promotion because she was placed on a "Performance Improvement Plan," or received poor performance appraisals.

claim show: (1) that [s]he belongs to a protected group; (2) that [s]he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability." Miller v. Kentworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). In order to be actionable, the conduct in question must be "severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21, 114 S. Ct. at 370. Moreover, the plaintiff must "subjectively perceive

the environment to be abusive." Id. "In evaluating the objective severity of the harassment, we consider, among other factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Miller, 277 F.3d at 1276.

The only conduct clearly presented by Saunders' for our consideration on this claim is three black-and-white motivational signs allegedly posted in employee areas and complaints made against Saunders by other employees. Saunders has presented no evidence that would allow a reasonable juror to conclude the signs are objectively racially harassing. First, it is hardly clear from the record that the signs are intended to depict black nurses at all. Second, assuming they do, the signs do not display any racially offensive motivation. Thus, it is

impossible for the signs to be "severe or pervasive" enough to create an objectively hostile or abusive work environment. Saunders has also presented no evidence that would indicate that the complaints from other employees were based on her race. The record indicates that these complaints were directed towards Saunders' workplace behavior and attitude toward others without any reference to race. Moreover, Saunders concedes that she has not been subjected to any racially offensive comments. Because the complained of conduct is either not based on Saunders' race or not severe or pervasive enough to create an objectively hostile or abusive work environment, the district court did not err by entering summary judgment against Saunders on her hostile work environment claim.

In this case, Saunders has not identified any basis for disturbing the district court's judgment. Accordingly, we affirm the grant of summary judgment in favor of Emory.

AFFIRMED.

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APPENDIX "B"

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BELINDA SAUNDERS,

Plaintiff,

v.

1:07-cv-0282-WSD

EMORY HEALTHCARE, INC.,

Defendant.

OPINION AND ORDER

Plaintiff Belinda Saunders ("Plaintiff") sued her employer, Emory Healthcare, Inc. ("Defendant"), for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). 42 U.S.C. §§ 2000e, et seq. The matter is before the Court on the Defendant's Motion for Summary Judgment [128]. The matter is also before the Court on several miscellaneous motions including Plaintiff's Motion to Stay [148], Plaintiff's Motion

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to Strike [152], Defendant's Motions to Strike [157, 159], and Plaintiff's Motion for Extension of Time [164].

I. PROCEDURAL BACKGROUND AND PRELIMINARY MOTIONS

Before addressing the primary factual and legal arguments on summary judgment, the Court must address the procedural posture of this case and several ancillary motions related to the record.

Plaintiff, an African-American female, alleges that the Defendant engaged in racial discrimination and wrongful retaliation, and she asserts her discrimination claims created a hostile work environment. Plaintiff filed this suit in the Superior Court of DeKalb County, Georgia on December 26, 2006. Defendant removed the case to this Court on January 31, 2007. Under the Court's local rules, discovery matters in this case were referred to Magistrate Judge Brill. On May 22, 2007, Plaintiff communicated *ex parte* with Magistrate Judge Brill, complaining about

Appendix B

he performance of her initial attorney, Neal Callahan of
/aldrep, Mullin & Callahan. On June 26, 2007, Plaintiff
erminated her representation by Mr. Callahan. Curtis
/illiams of Molden, Holley, Fergusson, Thompson & Heard
egan representing Plaintiff the next day.

On August 31, 2007, Plaintiff suffered what she
haracterized as a mild stroke. As explained below, Plaintiff
s currently on leave from her employment with Defendant.
n October 9, 2007, Plaintiff's second counsel, Mr.
/illiams, moved to withdraw with Plaintiff's consent.
agistrate Judge Brill granted the withdrawal on October
3, 2007. Plaintiff is currently proceeding in this action
o se.

The parties to this litigation have been involved for
ome time in protracted discovery and legal disputes. Judge
rill addressed several of the discovery disputes, many of
hich involved extensions Plaintiff sought in the time for

scheduling her deposition. Plaintiff filed additional discovery motions, sought expedited review, and moved for Judge Brill's recusal.

On February 22, 2008, the Court denied Plaintiff's motion to recuse Judge Brill and denied-in-part the several discovery motions then pending [98]. Plaintiff appealed this Order to the Eleventh Circuit [101].[1] On March 13, 2008, the Court held a hearing to address the several outstanding discovery issues that were not resolved in the Court's February 22, 2008 Order – primarily when Plaintiff would consent to sit for a deposition [105]. On April 10, 2008, the Court entered an Order addressing these matters and setting a date for the close of discovery [116].

On May 30, 2008, the Defendant moved for summary judgment [128]. On July 9, 2008, the Court was advised

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[1] 1 On May 2, 2008, the Eleventh Circuit dismissed Plaintiff's appeal *sua sponte* for lack of jurisdiction [119].

Appendix B

hat Plaintiff had filed for Chapter 7 bankruptcy protection n the United States Bankruptcy Court for the Northern)istrict of Georgia on March 28, 2008 [144]. The ankruptcy Court appointed a trustee in bankruptcy for laintiff, who retained C. Andrew Head as special ounsel to represent Plaintiff's bankruptcy estate in this itigation. On July 9, 2008, the Court and the parties in this ase were advised that Plaintiff's bankruptcy rustee has been substituted as the real party in interest in his action [144]. Plaintiff's bankruptcy trustee sought an xtension in the time to respond to the pending summary dgment motion [145]. The motion was granted by the ourt.

On July 11, 2008, Plaintiff's bankruptcy trustee filed memorandum in opposition to the Defendant's summary dgment motion [146, 147]. On July 25, 2008, Defendant led its reply to the bankruptcy trustee's response [149].

Appendix B

On July 23, 2008, Plaintiff filed what she captioned as an opposition to the participation in this action by her bankruptcy trustee and a motion to stay proceedings in this case until the termination of her Chapter 7 suit [148].

On October 6, 2008, Plaintiff filed a motion to strike the Declaration of Marilyn Margolis, attached to the Defendant's motion for summary judgment, and several of the Defendant's exhibits [152]. Plaintiff, acting *pro se*, filed her own memorandum in opposition to the Defendant's motion for summary judgment [153-156]. Plaintiff's filings on the summary judgment motion are voluminous in the extreme.[2]

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[2] Plaintiff filed a 14-page declaration with over 100 pages of exhibits [153]. Plaintiff filed a 79-page statement of additional material facts she contends are relevant to this case identifying 193 purported additional material facts [154]. Plaintiff's response to the Defendant's statement of undisputed material facts, itself 66 pages long, adds as attachments 300 pages of unauthenticated exhibits. Finally, Plaintiff's response brief, for which she had already received a 10-page extension, has attached to it over 600 hundred pages of disorderly, unauthenticated exhibits.

Appendix B

On October 7, 2008, Plaintiff's bankruptcy trustee filed a notice that Plaintiff's Chapter 7 bankruptcy case had been dismissed by the bankruptcy court and that Plaintiff should be re-substituted as the real party in interest in this action [151].

On October 8, 2008, the Defendant filed a motion to strike the Plaintiff's response and motion to strike as untimely. Alternatively, Defendant requested that the Court strike the briefing of Plaintiff's bankruptcy trustee based on its inconsistency with the Plaintiff's positions [157].

On October 9, 2008, the Court approved the re-substitution of the Plaintiff as the real party in interest [158].

On October 20, 2008, the Defendant moved to strike for lack of authentication the exhibits filed by Plaintiff as attachments to her summary